Supreme Court, U. S.
FILED
JAN 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1869

PETER H. BEER, PHILIP C. CIACCIO, JOSEPH V. DIROSA, CLARENCE O. DUPUY, JR., JOHN D. LAMBERT, JR., AND JAMES A. MOREAU, Members of the Council of the City of New Orleans, Acting For and On Behalf of the City of New Orleans, *Appellants*

v.

UNITED STATES OF AMERICA

and

WILLIAM B. SAXBE, Attorney General of the United States, Individually and in His Official Capacity,

and

JOHNNY JACKSON, JR., ET AL., *Appellees*

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of Columbia in the case at bar was reported at 374 F.Supp. 363. Pertinent papers of the lower court are reproduced in the Appendix to the Jurisdictional Statement (A.Jur.S.). They consist of the opinion of the court (A.Jur.S. 1a-72a) and the court's judgment (A.Jur.S. 73a-74a).

JURISDICTION

Appellants sought a Declaratory Judgment in the United States District Court for the District of Columbia that a redistricting plan for councilmanic elections in the City of New Orleans did not violate Section 5 of the Voting Rights Act of 1965, 79 Stat. 439 (1965), as amended, 84 Stat. 315 (1970), 42 U.S.C.A. Section 1973c (1974). Jurisdiction of the District Court over the case was founded upon the Voting Rights Act of 1965, *supra.* The District Court, sitting as a three-judge court under the requirements of that statute, denied the Appellants' request and dismissed the action in a judgment entered March 15, 1974. Appellants filed Notice of Appeal on April 5, 1974 in the United States District Court for the District of Columbia and this Court noted probable jurisdiction on October 15, 1974.

Jurisdiction is vested in this Court under Section 5 of the Voting Rights Act of 1965, *supra.,* and is supported by *Allen* v. *State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d. 1 (1969) and *Perkins* v. *Matthews,* 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d. 476 (1971).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case focuses upon Section 5 of the Voting Rights Act of 1965, *supra.,* which is not set out verbatim here due to its length (A.Jur. 5a-6a). An ordinance passed by the Council of the City of New Orleans, Louisiana, Ordinance No. 5154, Mayor Council Series, which was enacted on May 3, 1973, is also involved in this case. (A. 12).

QUESTIONS PRESENTED

1. Whether the Court below improperly held that § 5 of the Voting Rights Act of 1965 was applicable to at-large council seats, provision for which had been in effect and unaltered in New Orleans since prior to November 1, 1964, the effective date for this purpose of the Voting Rights Act of 1965.

2. Whether the Court considered and applied improper criteria in evaluating the redistricting plan and measured the effect of the plan with regard to its impact on minority voting rights against improper legal standards.

3. Whether the court improperly determined that the redistricting plan would have the effect of abridging the right to vote on account of race or color.

STATEMENT OF CASE

The present Charter of the City of New Orleans became effective on May 1, 1954. This Home Rule Charter for the first time set up a Mayor-Council form of government in which the mayor assumes the executive duties of government, and the City Council performs a primarily legislative function. The Charter totally re-organized the City Council, providing for a total of seven members, two of whom are elected at large, and five of whom are elected from single member geographical districts of equal population. The Charter provision is as follows:

> "Section 3-120. Number and Terms of Councilmen. The Council shall consist of seven members, of whom five shall be elected from districts and two from the City at large. The terms of councilmen shall be four years beginning on the first Monday in May next following their election except that a councilman selected to fill a vacancy

shall serve only for the remainder of the unexpired term." (A. 15)

The responsibilities of the two at-large councilmen differ from the others in that one of them, by appointment of the mayor, temporarily assumes the executive duties of government when the mayor is away or otherwise unavailable. One of the at-large councilmen holds the position of President of the City Council, a position which alternates between them every four months. The at-large councilmen are also ex-officio members of the New Orleans Sewage and Water Board, an independent governmental agency chartered by the State of Louisiana, and are ex-officio members of the Board of Liquidation of Debt of City of New Orleans, an independent board chartered by the State Constitution to administer the City debt structure. In addition, the two at-large councilmen alternate as members of the Louisiana Stadium & Exhibition District Commission.

Section 3-103(3) of the City Charter mandates the City Council to redraw the five single-member districts in the City into equally populated districts within 6 months after the official publication of each federal decennial census. The method of voting for the two at-large councilmen is not affected by this section. The section is as follows:

> "Section 1-103(3). It shall be the mandatory duty of the Council to redistrict the City by ordinance within six months after the official publication by the United States of the population of the City as enumerated in each decennial census. Each councilmanic district shall contain as nearly as possible the population factor obtained by dividing by five the City's population as shown by the decennial census." (A. 16)

After the 1960 census figures were published, the councilmen re-districted the City into five districts of equal population as required by the above provision of the City Charter. (A. 621).

Thereafter the Voting Rights Act of 1965 was passed by the Congress. 42 U.S.C.A. § 1973c (Supp. 1972). Section 5 of the Act provides in pertinent part:

> "Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure. *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

When the next decenial census figures were published in 1971, the City Council, obeying the mandate

of the City Charter, initiated procedures to redraw the boundaries of the five single-member districts. The Councilmen recognized that Section 5 of the Voting Rights Act of 1965 imposed two new requirements on this procedure. First, consideration must be given to the racial composition of New Orleans in drawing up a plan that does not have the purpose and effect of denying or abridging the right to vote on account of race or color. Second, the plan should be submitted to the Attorney General of the United States for his approval.

On March 2, 1972, the City Council passed a redistricting ordinance, commonly referred to as Plan I, and submitted the plan to the Attorney General of the United States for approval. The Attorney General interposed an objection to Plan I on January 15, 1973. (A. 29, 30).

As a result of the extensive and comprehensive public hearings held concerning Plan I, and before the Attorney General interposed an objection to Plan I, the Council approved two ordinances offering the voters of New Orleans alternatives to the seven-member legislative body and successively submitted them to separate city-wide referenda. The first called for an expansion to eleven members, and the second for an expansion to nine members, both retaining two at-large Council seats. The two ordinances were defeated by the electorate.

The City Council passed Ordinance No. 5154 Mayor Council Series (hereinafter referred to as "M.C.S.") on May 3, 1973, commonly denoted as Plan II, and submitted it to the Attorney General for approval. The Attorney General interposed an objection to the plan on July 9, 1973, stating in part ". . . the boundary

lines prescribed by Ordinance 5154 M.C.S. appear to effect a dilution of black voting strength . . .", and further states that the plan ". . . combines a number of black voters with a larger number of white voters in four of the five districts." (A. 33-35). The objections of the Attorney General left the redistricting plan inoperative.

Appellants, six members of the City Council, filed an action on July 25, 1973 in the United States District Court for the District of Columbia on behalf of the City of New Orleans against the United States of America. Appellants sought a declaratory judgment under Sec. 5 of the Voting Rights Act of 1965, *supra,* that the second councilmanic redistricting Plan (Plan II) has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.

The three judge federal court held four days of hearings in August and October, 1973 (A. 58-498), accepted briefs from all the parties and held oral arguments in January, 1974. On March 15, 1974, the court rendered an opinion and judgment (A. Jur. S. 1a-74a) denying declaratory judgment and dismissing the Appellants' action. Appellants brought this appeal from that decision to the Supreme Court of the United States, as provided in Section 5 of the Voting Rights Act, *supra.* This Court, noted probable jurisdiction on October 15, 1974.

Prior to the adoption and submission of Plan II, various other plans had been considered by the City Council and the electorate. The electorate had participated in the process through public hearings and the two referenda held on the question of increasing the size of the City Council. The plans, including

Plan II, were originally developed by the Research Staff of the City Council from guidelines which included recommendations arising from the Attorney General's opinions, case opinions, public sentiment, the National Association for the Advancement of Colored People (NAACP), and local political parties. Neither Plan I nor Plan II in any way altered or affected the election of the two at-large members of the City Council.

The guidelines included recommendations to avoid the dilution of minority rights, to achieve mathematical balance of population, to devise contiguous and compact councilmanic districts, to observe certain natural and historical boundaries, and to adhere to established Ward and Precinct boundaries to the extent possible. (A. 183-198).

The map appearing in the Appendix at page 620 shows the distribution of black and white voters in the City and the geographic division of the City as embodied in Plan II. (See also the map appearing in the Appendix at page 624). The 1961 redistricting plan, now in effect, appears in the Appendix at page 621. The NAACP Plan, which does not differ significantly from Plan II, appears in the Appendix at page 625.

SUMMARY OF ARGUMENT

I. The District Court held the at-large voting system subject to the provisions of the Voting Rights Act despite the fact that the at-large voting system had not been changed by Plan II and therefore was not subject to the Voting Rights Act of 1965. The at-large voting system had been in effect since the effective date of the Home Rule City Charter on May 1, 1954 and since there was no change in the at-large voting system, the District Court improperly held that it was subject to the Voting Rights Act of 1965.

II. A. The District Court employed an improper definition of dilution in analyzing the redistricting plan under Section 5. The Court should have applied the test of the effect of the voting law by itself on the weight of the vote. The Court imposed a definition of dilution which was broader and harsher than the requirements of Section 5.

II. B. The District Court misapplied the "compelling state interest" test to this case which is a case of a reapportionment nature under Section 5 of the Voting Rights Act. This Court has applied the "compelling state interest" test in cases involving direct restrictions on a citizen's right and ability to vote. Cases of a reapportionment nature, such as this case, have been decided under a "rational basis rule." The District Court applied the wrong standard in this case.

II. C. The District Court established an unprecedented burden of proof when it found that the City of New Orleans had the burden of proving that nothing but the redistricting plan contained in Plan II was feasible. No comprehensive redistricting plan can be formulated which is the only plan feasible. Reasonable variations must be permissible. The City Council, in adopting Plan II, applied proper and reasonable guidelines and the plan does not have the purpose and effect of denying or abridging the right to vote on account of race or color.

II. D. The District Court misapplied the Voting Rights Act of 1965 in finding that any deviation from maximal black voting strength was *ipso facto* a violation of the act.

ARGUMENT

I. THE LOWER COURT SHOULD HAVE OMITTED THE AT-LARGE VOTING SYSTEM FROM ITS CONSIDERATION SINCE IT REMAINED UNCHANGED AND WAS NOT SUBJECT TO THE VOTING RIGHTS ACT OF 1965

The Council of the City of New Orleans is composed of seven members, two of whom are elected at-large, and five of whom are elected from single-member districts. The City Charter requires the redrawing of lines of the five districts after the publication of each decennial census. The redistricting which was proposed as Plan II was passed by ordinance in 1973. All changes in voting laws of states or political subdivisions are subject to Section 5 of the Voting Rights Act if these changes were effected after November 1, 1964. The election system for the two at-large councilmen was not changed to any degree by Plan II. The at-large election system has remained unchanged since the City Charter became effective on May 1, 1954.

The statute on its face therefore does not require consideration of the at-large voting system under Section 5 of the Act. Although this Court has established in past cases that election laws which have not changed since November 1, 1964 may be subject to the approval requirements of Section 5, this Court has only permitted judicial review of unaltered voting systems which were related to altered redistricting proposals as in *Georgia* v. *United States*, 411 U.S. 526 (1973) (plan changing the number and size of multi-member districts as well as single-member districts) and *City of Petersburg*, 354 F. Supp. 1021 (D.D.C. 1972) affirmed 410 U.S. 962 (1973) (process of annexation).

These cases involved reformulated redistricting plans which would have affected the outcome of elections in the unaltered voting systems. The unaltered

systems were therefore properly subjected to Section 5 standards as they were included in the political context in which the altered voting system would operate.

In the instant case the redistricting of the single-member districts will have no effect upon the outcome of elections in the at-large systems. The two voting systems are completely separate in form and substance. The at-large voting system will not operate to any degree in the same political context in which the single-district procedure will function. Since the at-large system has not been altered in any way since November 1, 1964, the lower court erred in including the at-large procedure in its consideration.

The District Court, on its own initiative, has effected a sudden and far-reaching extension of the scope of the Voting Rights Act. A comprehensive voting system must have ordinances which are interrelated in order to succeed in our increasingly complex society. Yet such a voting system in its entirety is now made completely vulnerable to federal scrutiny upon the alternation of a minor ordinance. The time threshold in Section 5 has been ignored by the District Court in its unprecedented action.

The dual voting system which includes two at-large seats and five single-member district seats was established in the Home Rule Charter of the City of New Orleans which became effective on May 1, 1954. This Charter for the first time set up a Mayor-Council form of government with the Mayor assuming the executive duties of government and the Council performing primarily the legislative function. However, the two at-large councilmen have separate and distinct responsi-

bilities from the other councilmen in addition to their normal legislative responsibilities as members of the Council. One of the at-large councilmen, by appointment of the Mayor, temporarily assumes the executive duties of government when the Mayor is away or otherwise unavailable. The at-large councilmen are also ex-officio members of the New Orleans Sewage and Water Board, an independent governmental agency chartered by the State of Louisiana, and are ex-officio members of the Board of Liquidation of Debt of City of New Orleans, an independent board chartered by the State Constitution to administer the City debt structure. The two at-large councilmen alternate as members of the Louisiana Stadium & Exhibition District Commission. In addition, one of the at-large councilmen holds the position of President of the City Council, a position which alternates between them every four months.

Thus it is readily apparent that the two at-large Council seats are different and distinct from the other five Council seats and they cannot be treated as though all seven seats have the same characteristics with the same responsibilities. The court below treated all seven Council seats as though they were the same, when in fact they are not. The at-large voting system was not changed, and this Court must reverse the decision of the lower court and hold that the unaltered at-large voting system is not properly within the ambit of Section 5.

II. THE DISTRICT COURT HAS APPLIED IMPROPER CRITERIA AND EMPLOYED IMPROPER STANDARDS IN WEIGHING THE EFFECTS OF THE REDISTRICTING PLAN UPON BLACK VOTING STRENGTH IN NEW ORLEANS

A. The District Court utilized an improper standard in determining the dilutionary effects of Plan II

The Voting Rights Act of 1965, *supra,* was enacted to prohibit certain states from discriminating against minority voters through voting laws. The law specifically requires that a state or political subdivision thereof must seek approval from the United States Attorney General or the United States District Court of the District of Columbia whenever it "enacts or seeks to administer any voting qualification or prerequisite to voting, or standard, practice or procedure" which differs from that in force or effect on November 1, 1964, *Voting Rights Act, supra Section 5.* The Attorney General or District Court must affirm that the voting law does not have "the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.*

In *Allen* v. *Board of Elections*, 393 U.S. 544 (1968), this Court held that a multi-member voting plan was a voting qualification, standard, practice or procedure within the scope of Section 5. Any dilution of voting strength which might have occurred in implementing the new voting system for county supervisors was therefore implicitly found to be susceptible to Section 5 control.

In *Perkins* v. *Matthews,* 400 U.S. 379 (1971), this Court held that the proposal for city annexation of real property also constituted a voting law which could be embraced by Section 5. Such an annexation was thereby made vulnerable to the charge of dilution of voter strength in violation of Section 5. In neither

case did this Court attempt to decide whether the change in voting law actually did dilute voting strength; the issue was one of jurisdiction. The Court also did not define the nature of dilution of voter strength in this context.

The Court eventually alluded to the nature of dilution in apportionment cases, but has never considered the concept in a Section 5 case. The Court inexplicably introduced two primary definitions with very subtle, although massive, differences in implication.

The Court presented both definitions in the apportionment cases of *White* v. *Regester,* 412 U.S. 755 (1973), where the dilutionary effect of multi-member districts was at issue. The first standard of dilution was said to demand relief when multimember districts are being "used insidiously to cancel or minimize the voting strength of racial groups."

The second standard was employed when the Court asserted that the ". . . plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White* v. *Regester, supra,* at 765, 766.

Allen and *Perkins* were both Section 5 cases which involved voting laws of a reapportionment nature. *Allen* implicitly indicated that since the multi-member voting procedure approximated a reapportionment situation, the dilutionary effect of a voting law requiring approval of the courts under Section 5 could

be examined in the same way as it might have been examined under reapportionment law. This Court returned to *Allen* in *Perkins,* stating in the context of Section 5 cases that, "Congress intended to adopt the concept of voting articulated in *Reynolds* v. *Sims* . . . (to) protect Negroes against dilution of their voting power." *Fairley* v. *Patterson,* 393 U.S. 544, 588 (1969), as quoted in *Perkins* v. *Matthews, supra,* at 390. The problem now has arisen as to the standard of "dilution" to be employed in determining whether dilution of the vote on account of race or color has occurred in Section 5 cases.

This Court has discussed the dilution test a number of times in apportionment cases, *Cf. Fortson* v. *Dorsey,* 379 U.S. 433 (1965), *Whitcomb* v. *Chavis,* 403 U.S. 121 (1971), *White* v. *Regester, supra,* and employed the rule once in an apportionment case. *White* v. *Regester, supra.* The dilution rule has never been applied by this Court to a Section 5 case to determine whether dilution has resulted from the implementation of a voting law within the scope of Section 5.

The lower court in the instant case applied one of the two dilution standards enunciated by this Court to Plan II adopted by the City Council of New Orleans and found that dilution had occurred. It is clear that the District Court employed the improper definition of dilution in analyzing the redistricting proposal under Section 5. The court chose the latter and quoted *White* v. *Regester, supra.* (A. Jur. S. 36a).

The difference between the two standards proposed by the Court are subtle but substantial. The "cancelling" standard finds dilution where voting laws would operate to "minimize or cancel out the voting

strength of racial or political elements of the voting population." Upon careful study of the phrase it becomes clear that this standard implicitly takes the view that the only relevant criterion in determining whether voting rights have been weakened is the effect of the voting law *by itself* on the weight of the vote. In the instant case, under this standard, the study of the dilutionary effects of Plan II would be limited to the actual effect of its implementation upon black voting strength in the City of New Orleans.

The "opportunity" standard would note dilution where "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Whitcomb* v. *Chavis, supra,* at 765, 766.

This standard is susceptible to the interpretation that the voting law in question is *not* the sole criterion in discerning whether dilution of voting strength has occurred. Implicit in the phrase "had less opportunity" lies the freedom of the court to search for other possible factors, both within and beyond the control of the legislators, which might have contributed to the dilution of voting strength in tandem with the enervating effect of the voting law.

This second definition has far-reaching implications in that a court would look to the entire social, economic and political context and strike down a voting law which did not *itself* ameliorate the specific damages resulting from these other facts or even though the law *itself* produces effects which do not deny or abridge the right to vote on account of race or color.

The distinction between the two definitions is very important, and must be analyzed in the context of the comprehensive prohibitions stated in Section 5. The dilution standard is a rule devised by the reapportionment cases. In introducing this standard of dilution into Section 5 cases, the courts cannot impose a harsher and broader standard than the Congress has already established through its statutory language. The purpose of Section 5 is to insure the implementation of state and political subdivision law which "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . ." *Voting Rights Act, supra,* Section 5. A definition of dilution must not be employed which is broader and harsher in coverage than this requirement of Section 5. Close examination of the statute reveals that the second definition, which was employed by the lower court, is harsher and broader than the Section 5 language. Both Section 5 and the first definition converge and indicate that the only relevant criterion in determining whether dilution has occurred is to examine the effect which the statute in question has *by itself* on minority voting strength.

The lower court chose, however, to use the more expansive and looser definition, in derogation of the requirements of Section 5. The liberties which may be taken by a court in employing the second more liberal definition become apparent in cases such as *Zimmer* v. *McKeithen,* 485 F.2d 1297 (1973), and *Turner* v. *McKeithen,* 490 F.2d 191 (1973). It must be emphasized that these were in the nature of reapportionment cases, *not* Section 5 cases. The lower court in the instant case relied heavily on these cases in analyzing Plan II.

In *Zimmer,* the U.S. Court of Appeals implicitly expanded the application of the second Supreme Court definition. The court stated that ". . . although population is the proper measure of equality in apportionment, in *Whitcomb* and *White,* the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength." *Zimmer, supra,* at 1303. The court thereby stripped this Court's standard of any reference to the voting statute involved in the case.

This allowed the court to investigate factors other than the specific statute or ordinance in question in order to determine whether dilution had occurred. The *Zimmer* court studied all the effects of past discrimination upon black voters in a Louisiana parish and concluded that the voters had been denied "access." Yet the court chose to ignore the fact that three black representatives had recently been elected under the voting system at issue.

This case involved a reapportionment adjudication. Yet, the exceedingly broad definition given to "dilution" by the *Zimmer* court too easily found its way into the reasoning of the lower court in the case at bar. *Zimmer* clearly and emphatically reveals the extent to which the mandate of Section 5 will be ignored if the increasingly liberalized "opportunity" and "access" definitions of "dilution" are utilized by the courts.

This comprehensive investigation may well have been justified in *Zimmer,* since the case lay in the realm of apportionment. But such analysis cannot be made in cases adjudicated under Section 5, since Section 5 explicitly demands that the dilutionary purpose and effect of the statute itself be determinative of the statute's validity.

B. The District Court improperly extended the burden of proving a "compelling state interest" to a voting law of a reapportionment nature under Section 5

Section 5 of the Voting Rights Act appears on its face to prohibit only discrimination which directly restricts the right and ability of a voter to cast his ballot. Such laws have included, inter alia, interpretation tests, white primaries, literacy tests, and grandfather clauses. In affirming the constitutionality of the Voting Rights Act in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), this Court gave no indication that the Act reached beyond these simple procedural devices for discrimination against minority voters on the basis of race or color.

The Court decided in *Fairley* v. *Patterson, supra,* a *companion case to Allen* v. *Board of Elections, supra,* that the Voting Rights Act forbade more complicated election laws which discriminated on the basis of race or color. The case involved, inter alia, the legality of a Mississippi state statute which permitted county boards of supervisors to alter the county election procedure from one requiring the election of county supervisors by district to a system requiring election at-large. The new statute did not pose any threat to the ability of a minority voter to cast his ballot on election day. Yet the court held that such election laws were within the scope of Section 5. The Court merely ruled on the jurisdictional issue, and made no decision as to the discriminatory effect of the voting law.

In *Perkins v. Matthews, supra,* this Court found that the scope of Section 5 extended to other complicated election laws. That case involved an attack on an ordinance permitting city annexation of real property which resulted in increased number of city

voters. The Court established that this ordinance also constituted a voting qualification, standard, practice or procedure within the scope of Section 5. Again, the court made no decision as to the discriminatory effect of the law in question; its attention was merely directed at jurisdiction.

The instant case implicitly continues the logical expansion of the scope of Section 5. The applicability of Section 5 to the redistricting plan at issue is accepted by all parties involved. This Court has not ruled on the applicability of Section 5 to redistricting plans such as Plan II, which are unaccompanied by annexations or changes from single-member to at-large voting systems. Many states have assumed that Section 5 embraces such laws and have submitted them to the Attorney General on their own initiative for approval. The Attorney General shares this assumption. In voluntarily submitting Plan II to the United States Attorney General, the City Attorney of the City of New Orleans implicitly recognized that the proposal was within the ambit of Section 5.

It readily becomes apparent that the expanding scope of Section 5 has increasingly encompassed voting rights procedures which approximate reapportionment formulas. The line of reapportionment cases has seen cases involving a shift from single-member to at-large voting, similar to that which occurred in *Allen,* city annexations of real property, such as occurred in *Perkins,* and the redrawing of councilmanic district lines, as occurred in this case. The procedure of adjudicating the laws of an apportionment nature such as those treated in these later cases differs greatly from the procedure governing the adjudication of the state and political subdivision laws which directly restrict

through literacy requirements and grandfather clauses the right and ability of a minority voter to cast his ballot.

In this case the nature of the burden of proof stands as the primary difference between procedure relating to laws of an apportionment nature under Section 5, and the procedure relating to laws of a more directly restrictive nature under Section 5. Section 5 presents a unique procedural requirement in locating the burden of proof, in that the state or political subdivision involved has the burden of proving the lack of discriminatory purpose and effect of its voting law, regardless of whether the statute or political subdivision acts as the plaintiff or defendant in the case. *Voting Rights Act, supra,* Section 5.

The location of that burden of proof is not contested in this case; the burden properly rests upon the Appellants. Appellants do contend that the nature of the burden was incorrectly formulated by the lower court, and that this error resulted from the trial court's refusal to accept the differing burdens of proof associated with the two divergent types of voting laws which have been encompassed by Section 5.

If any law passed by a state or political subdivision does not infringe on a person's Constitutional rights, the law will be sustained if the state or political subdivision successfully bears the burden of proving that any other infringement is justified because the law furthered a legitimate state interest on a rational basis. In a case where a statute or ordinance of any nature violates a constitutionally protected right, such as the right to equal protection guaranteed by the Fourteenth Amendment, the state or political subdivision which passed the law has the burden of proving

that the law furthers a compelling state interest. *Skinner* v. *Oklahoma,* 316 U.S. 535, *Williamson* v. *Lee Optical Co.,* 384 U.S. 483, *McLaughlin,* 379 U.S. 184, *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (see other cases on this subject listed in *Dunn* v. *Blumstein,* 405 U.S. 330 (1972)). The latter burden is an exceedingly heavy one since constitutionally protected rights are only cautiously inhibited.

These fraternal standards of proof have performed vigorous service in the development of American jurisprudence and have exerted a great role in determining the validity of the two general types of voting laws which lie within the scope of Section 5. This Court has frequently established that only a showing of a compelling state interest by a state or political subdivision will sustain the validity of the form of voting laws which effect direct restrictions on a registered voter's right to vote. *Dunn* v. *Blumstein, supra, Kramer* v. *Union Free School District,* 395 U.S. 621 (1969), *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1965), *Carrington* v. *Rush,* 380 U.S. 89. This results from the intolerable restrictions on the equal protection rights, guaranteed by the Fourteenth Amendment, of the individual involved.

On the other hand, this Court has always required states and their political subdivisions to show only a reasonable basis and a legitimate state interest for voting laws of a reapportionment nature. *Reynolds* v. *Sims,* 377 U.S. 533 (1964), *Swann* v. *Adams,* 385 U. S. 440 (1966), *Abate* v. *Mundt,* 403 U. S. 182 (1971), *Mahan* v. *Howell,* 410 U.S. 315 (1973). The Court asserted that substantial equality of population must be generated in states and their political subdivisions

among the electoral districts for any governmental body with legislative or general governmental powers.

The Court declared in *Reynolds* that divergences from equality of population which resulted in dilution of the weight of citizens' votes could be justified by a state or political subdivision through a showing of a rational basis for voting laws which diverged from substantial equality among the electoral districts. "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviation from the equal-population principle are consititutionaly permissable . . ." *Reynolds* v. *Sims, supra,* at 579-580.

The cases concerning direct restrictions on a citizens' right and ability to vote have been judged on a compelling state interest standard. The cases of a reapportionment nature have fallen under a rational basis rule. Courts have not encountered difficulty in selecting the burden of proof to be applied in particular voting rights cases, since the two types of cases have generally been adjudicated in separate sequences of precedent. This Court has always judged laws of an apportionment nature such as the New Orleans Plan II which is presently before it on a rational basis standard.

The lower court made a surprising leap of logic in applying the compelling state interest standard to this case. In its opinion, the lower court stated the following:

> Dilutions of the right to vote which are to be tested by the equal protection standard—which involves a balancing of competing governmental and private interests—may withstand analysis

upon a firm showing that they are rationally related to a permissible governmental interest. But, the Supreme Court admonishes, "a more exacting test is required for any [governmental action] that 'place[s] a "condition" on the exercise of the right to vote.'" In pursuing even the most substantial of its interests, government "cannot choose means which unecessarily burden or restrict constitutionally protected activity." So, if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'" . . . We have no doubt whatever that in light of the strictness of the Fifteenth Amendment, the standard which justification of denial of voting rights must meet applies equally to dilutions of those rights. Nor do we doubt that Section 5 of the Voting Rights Act accomodates any less than the Fifteenth Amendment demands. (A. Jur. S. 51, 52a)

The lower court applied the compelling state interest standard to the redistricting formula proposed by the City of New Orleans and found that the city had not met its burden. The court found in its own calculations, which are hereafter challenged that the redistricting ordinance did not further a compelling state interest in diverging from a redistricting scheme which would provide optimal voting strength for black registered voters.

The lower court has grossly erred in requiring the appellants to show that the deviations from optimal black voting strength were furthered by a compelling state interest. The burden which the City of New Orleans bears in this case should be the same as the burden borne by states and political subdivision in reapportionment cases.

This Court declared in *Reynolds* v. *Sims, supra,* that reapportionment proposals must be based on substantial equality of population. Yet such equality is not enforced by the application of a compelling state interest standard. The nature of the law under consideration in *Reynolds* differs little in substance from the law at issue in the instant case. The compelling state interest standard would place an unduly harsh burden on proposals, such as Plan II, of a reapportionment nature. The Court stated in *Abate* v. *Mundt, supra,* a reapportionment case at the county level, that ". . . viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs . . ." *Abate* v. *Mundt, supra,* at 185, citing *Sailors* v. *Board of Education,* 317 U.S. 105, 110-111 (1967). ". . . our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality." *Id.,* at 185.

This need for experimentation and flexibility at the local level has resulted in the application of a rational basis standard to reapportionment cases. Mr. Justice Holmes emphasized the desirability of this freedom many years ago, "we must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co.* v. *Pension,* 282 U.S. 399. Plan II of the City of New Orleans is very similar to a reapportionment case and must be judged on the same basis.

There should be no difference in the standard which protects the vote of minority voters from dilution under reapportionment cases and the standard which protects the rights of minority voters in cases of a reapportion-

ment nature which fall under Section 5. Yet the lower court has generated such a change. In *White* v. *Regester, supra,* a reapportionment case, this Court found that the voting power of black and Mexican-American voters had been unjustly diluted. This Court in that decision gave no indication that the usual application of a reasonable basis standard in reapportionment cases to such dilutionary effects had been abandoned in favor of a compelling state interest standard. The lower court in its decision in this case has deviated from this Court's application of the reasonable basis standard to cases of a reapportionment nature.

The Supreme Court has never employed the compelling state interest standard in apportionment type cases. The Attorney General in ruling on Plan II, rejected the redistricting proposal on the grounds that the City of New Orleans had not shown a compelling state interest in deviating from optimal voting strength. As the lower court had done, the Attorney General presented no authority for employing this standard. Under *South Carolina* v. *Katzenbach, supra,* states and political subdivisions submitting changes in voting laws to the Attorney General bear the same burden as they would in obtaining approval of such changes from the District Court. This Court should act to ensure that the Attorney General will not establish precedent for continued use of the compelling state interest standard in cases similar to the case at bar arising under Section 5.

This Court must remedy the lower court's drastic extension of legal doctrine in judging the dilution of black voting strength on a standard of compelling state interest, and must reverse the lower court and, applying the reasonable basis test, find that Plan II passes constitutional muster.

C. The District Court improperly held that the City had the burden of proving that nothing but the redistricting proposed by Plan II was feasible.

As previously discussed, the court below incorrectly applied the compelling state interest test to this case. Having done so, the court went even further in requiring that "the burden on the case at bar was at least to demonstrate that nothing but this redistricting proposed by Plan II was feasible." (A. Jur. S. 53a)

The footnote to the court's statement of the burden in this case at bar directs the reader to the court's textual discussion at footnotes 235 and 236. Rather than support the court's unique extrapolation of the burden, this textual discussion only enunciates the procedure of the Voting Rights Act which shifts the burden of proof to the state or political subdivision in cases within the scope of the Act. That textual discussion, and the cases cited therein, do not deal at all with a description of the nature of that burden.

The District Court would require that the state or political subdivision show that there were no other reasonable alternatives *at all.* This strange and illogical test would be impossible for any redistricting proposal to meet. No comprehensive redistricting plan can be formulated which is the only plan feasible. Reasonable variations can always be made to achieve the same ends.

In the Voting Rights Act of 1965, the Congress established the procedure to be followed by a state or political subdivision in order to effectuate the change in its voting procedures. This procedure included the submission of the plan to the Attorney General and the filing of a Declaratory Judgment action in the United States District Court for the District of Columbia. In

any Declaratory Judgment action, the burden of proof is by the preponderance of the evidence. The District Court in this decision has parted from that principal and has required that the political subdivision must prove that its plan is the only feasible plan. This ruling makes a sham out of the Declaratory Judgment procedure established in the Act by Congress since a court could easily rule that any plan presented to it did not meet the test of the statute since the political subdivision has failed "... to demonstrate that nothing but this redistricting proposed ... was feasible." (A. Jur. S. 53a)

In the case at bar, the City of New Orleans has met the burden established in the Act. The guidelines which were used in formulating the plan by its professional Council Research Staff and by its Council members and which included among other things the following guidelines:

1. Redistricting should be accomplished without diluting the voting rights of any minority group in the City of New Orleans. (A. 176, A. 205-206, A. 330-331)
2. Redistricting should be accomplished to achieve as nearly as possible a mathematical balance of population within each of the five (5) districts in order to insure compliance with the "one man-one vote" edict. (A. 176, A. 205-206, A. 326)
3. Wherever possible existing Ward and Precinct boundaries would not be disturbed by councilmanic district boundaries. (A. 186-187, A. 200, A. 327)
4. To the extent possible, historic and traditional councilmanic district boundaries would be observed

in order to preserve continuity within the electorate of the City of New Orleans. (A. 176, A. 205)

5. Natural boundaries created by the Mississippi River and Lake Pontchartrain and the economic and social effect of the river and lake on the City were to be considered. (A. 176, A. 205-206)
6. Man-made boundaries created in the form of important streets and highways and canals, majority of which run in a north-south direction, were to be observed. (A. 183-186, A. 200)
7. Prospective councilmanic districts should be contiguous and compact. (A. 325-326)

In addition to the foregoing guidelines and the data received from the Census Bureau, the Staff had received a proposed plan from the NAACP (A. 625) and a plan from the Republican Party (A.626).

Although the plans submitted by the NAACP and the Republican Party, in the opinion of the Staff, did not meet the requirements of compactness (A. 202, 336) the NAACP plan served as a valuable tool in the development of the second plan. An example of this is shown in the Staff handling of Councilmanic District B.

When faced with the large black voter concentration in existing District B and also faced with the need to increase the population of District B in order to meet the standards of the one man-one vote edict, the Staff was confronted with three possibilities. First, they could add population to District B by including all or part of Algiers, the only section of New Orleans

being on the west side of the Mississippi River. To do so, however, would have pitted the citizens of Algiers, who wanted another bridge across the river, against the citizens of existing District B who did not particularly want another bridge. Secondly, the Research Staff could have expanded, District B into the Fourteenth Ward to increase its population but by doing so would have been adding white voters which, in turn, would have the effect of diluting District B minority voting strength. Thirdly, in order to increase the population of District B and to avoid dilution, the Staff followed the suggestion of the NAACP by expanding existing District B into the Second Ward which slightly increased the black voting strength in District B. (A. 341). In other words, the Research Staff accepted the suggestion of the NAACP in the handling of District B as presenting the wishes of the black community (A. 341) and as the proper method of handling the expansion of District B to conform with the 1965 Voting Rights Act. Plan II which is before the Court includes the same Districts A and B as the NAACP plan.

Other examples of the procedure used by the Professional Research Staff and the Councilmen in arriving at Plan II could be given. Without getting into detail the Court's attention is directed to the testimony of Professional Research Staff Director James N. Pezant (A. 171-247), (A. 294-318) and Councilmen Research Staff employee Jonathan A. Eckert (A. 324-352), and to the testimony of Councilmen Peter H. Beer (A. 91-166), Philip C. Ciaccio (A. 358-392), John D. Lambert, Jr. (A. 469-478) and James A. Moreau (A. 247-292).

D. The District Court improperly measured the standards set forth in the Voting Rights Act of 1965

The District court allowed itself to get into a numerical formulation of maximal black voting strength and to conclude that any deviation from maximal black voting strength was *ipso facto* a violation of the Voting Rights Act of 1965. According to the opinion, any redistricing plan that did not maximize the potential of black voting strength, considering that black voters would vote as a bloc, would *ipso facto* "have the effect of denying or abridging the right to vote on account of race or color . . ." This conclusion is wrong. The court cited no precedent for its calculations. The court has improperly established a new standard by which to interpret the Voting Rights Act of 1965.

By this unprecedented procedure, the court allowed itself to find that Plan II had "the effect of denying or abridging the right to vote on account of race or color . . . ", and even stated that, having ruled on the *effect* of the Plan it did not have to consider the *purpose* of the Plan. In other words, the court construed the statute as though it read purpose *or* effect when in fact the statutory language is purpose *and* effect. This is clearly a misinterpretation of the statute.

Thus the court, in an attempt to prove that Plan II violated the Voting Rights Act of 1965, fell victim to its own pre-conceived ideas, unfounded in precedent, that a plan that did not realize optimal black voting strength according to the Court's calculations was *ipso facto* dilution of black voting strength in violation of the Voting Rights Act of 1965.

CONCLUSION

We have seen that the District Court improperly included in its judicial review of Plan II the unaltered at-large voting system contained in the Home Rule Charter which had been in effect since May 1, 1954; further that the District Court applied improper criteria and employed improper standards by extending the "compelling state interest" doctrine to a redistricting statute when such doctrine has been limited to direct restrictions on a citizen's right to cast his vote; that the District Court should have applied the reasonable basis test to determine whether the redistricting considerations are rationally related to permissible governmental interests; that the District Court applied an improper burden of proof in holding that the City had the burden of showing that Plan II was the only feasible plan; and that the District Court erred in concluding that any deviation from maximal black voting strength had the effect of denying or abridging the right to vote on account of race or color. The District Court has compounded its errors and this Court should reverse the decision of the District Court. The City Council applied proper criteria and guidelines in formulating Plan II. It is a reasonable redistricting plan which does not have the purpose and effect of denying or abridging the right to vote on account of race or color. This Court should reverse the District

Court and decree that Plan II complies with the Voting Rights Act of 1965 so that the Plan can become operative.

Respectfully submitted,

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